**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re: PITTSFIELD DEVELOPMENT LLC, Debtor.	Chapter 11 Case No.: 17-09513 Hon. Jacqueline P. Cox

LIMITED OBJECTION TO DEBTOR'S MOTION FOR ENTRY OF ORDERS (1) SETTING PROCEDURES FOR THE SALE OF ITS REAL ESTATE, (2) SCHEDULING A HEARING TO CONSIDER THE SALE OF ITS REAL ESTATE AND ENTRY OF AN ORDER SELLING THE REAL ESTATE FREE AND CLEAR OF INTERESTS, (3) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (4) APPROVING THE BREAK-UP FEE AND PROVIDING FOR RELATED RELIEF

Akara Partners ("**Akara**"), by and through its undersigned counsel, and for its Limited Objection ("**Objection**") to the Debtor's Motion for Entry of Orders (1) Setting Procedures for the Sale of its Real Estate, (2) Scheduling a Hearing to Consider the Sale of its Real Estate and Entry of an Order Selling the Real Estate Free and Clear of Interests, (3) Approving the Form and Manner of Notice Thereof, (4) Approving the Break-up Fee and Providing for Related Relief ("**Motion**") (Dkt. Nos. 64, 69), and states as follows:

PRELIMINARY STATEMENT

1. Pittsfield Development, LLC (the "**Debtor**") has been in distress for an extended period and has actively been trying to sell its assets since 2015. During that time, Akara has spoken to representatives for the Debtor on numerous occasions, which led to the submission of the Akara LOI (as defined herein) and then a fully negotiated Akara PSA (as defined herein) with the Debtor through its advisors. Akara expended significant resources during these negotiations, including having its professionals draft the definitive documentation. The Debtor has used those discussions, the Akara LOI, and the Akara PSA for the sole benefit of the Debtor

and to the detriment of Akara. Accordingly, if this Court is going to approve sale procedures for the sale of the Debtor's assets, it must put all bidders on equal ground, and provide for an open process because if there is no oversight of the Debtor's sale efforts, the risk exists for these tactics to once again spoil the process.

PROCEDURAL HISTORY

2. After a significant period of distress, on March 26, 2017 (the "**Petition Date**"), the Debtor commenced this case by filing a voluntary petition pursuant to chapter 11 of the Bankruptcy Code.

3. On April 3, 2017, the Debtor filed a Motion for Post-Petition Financing (the "**Financing Motion**") (Dkt. No. 5.) On April 5, 2017, PD Lender, LLC filed an objection to the Financing Motion (Dkt. No. 16.)

4. On April 10, 2017, the Debtor filed a reply in support of the Financing Motion ("**Reply**") (Dkt. No. 26.) Therein, the Debtor disclosed that in order to facilitate a sale of its property, it had engaged a broker to market its property, as well as the floors owned by Pittsfield Residential II LLC ("**Residential**") and Pittsfield Hotel Holdings LLC ("**Hotel**").

5. In the Reply, the Debtor also disclosed receipt of a letter of intent to purchase the property from Akara ("**Akara LOI**"), a true and correct copy of which was appended in its entirety in unredacted form to the Reply as Exhibit "2."

6. At no point in time, did the Debtor obtain Akara's consent to publicly disclose, or advise Akara that it would publicly disclose, the Akara LOI.

7. As a direct result of the Debtor's Reply, on April 12, 2017, Crain's published an article which identified Akara as the potential purchaser and publicly disclosed terms of the Akara LOI, including the purchase price of $16MM, and the earnest money deposit, "according

to a document filed recently in the U.S. Bankruptcy Court in Chicago." Alby Gallun, *Apartment developer to buy Pittsfield Building*, CRAIN'S CHICAGO BUSINESS, Apr. 12, 2017 *available at* http://www.chicagobusiness.com/realestate/20170412/CRED03/170419955/apartment-developer-to-buy-pittsfield-building.

8. When Akara read the Crain's article, it was the first time Akara learned that the Akara LOI was made public. Immediately thereafter, Akara's counsel entered its appearance in this bankruptcy case and reached out to counsel for the Debtor.

9. Despite the Reply and the Crain's article, with great trepidation, Akara began negotiating definitive documentation with the Debtor's advisors. Akara took the laboring oar on the initial draft of the purchase and sale agreement ("**Akara PSA**"). Akara and the Debtor shared several drafts of the Akara PSA and eventually got to a point where only a few terms were left to be negotiated.

10. Concurrently with the turns of the Akara PSA, Akara came to learn that the Debtor was also shopping Akara's offer to other potential purchasers. The Debtor strung Akara along and enticed Akara to continue to negotiate the Akara PSA, which it then used as a floor to seek other bidders. These efforts by Akara provided a "substantial contribution" to the Debtor's estate as the Debtor eventually determined not to pursue the Akara PSA.

11. On May 23, 2017, the Debtor filed its Motion, seeking, among other things, entry of an order approving procedures for the sale of its real estate, at initial presentation of the Motion on May 31, 2017, and approving the payment of a break-up fee in favor of Pioneer Acquisitions LLC (the "**Purchaser**") should a competitive bidder prevail over its $16.5MM offer to purchase the property, as set forth in the appended Purchase and Sale Agreement.

12. On April 30, 2017, Crain's published another article which identified Purchaser as the stalking horse bidder noting, "Pioneer's bid tops an earlier $16 million offer for the space from Chicago residential developer Akara Partners" and notes that Akara's LOI was entered less than two weeks after the Petition Date. Alby Gallun, *New Yorker Make a Run for Pittsfield Building*, CRAIN'S CHICAGO BUSINESS, May 30, 2017 *available at* *http://www.chicagobusiness.com/realestate/20170530/CRED03/170539992/new-yorkers-make-a-run-for-pittsfield-building*.

ARGUMENT

13. Akara presents its limited objection to the Motion for entry of an order approving procedures for the sale of its real estate, and approving the break-up fee.

14. As a prospective purchaser, Akara has standing to object to the Motion. See In re Dvorkin Holdings, LLC, 2013 WL 5609910, at ¶ 12 (Bankr. N.D.Ill. Sept. 26, 2013) citing In re Jon J. Peterson, Inc., 411 B.R. 131, 135 (Bankr. W.D.N.Y. 2009) ("as a prospective purchaser of the Property, [it] can provide 'valuable insight and perspective' to assist the Court in determining whether the Trustee's proposed sale of the Property…is in the best interests of the Debtor's bankruptcy estate."). The court rejected the debtor's assertion that prospective bidders have no standing to object to the terms and conditions of an auction sale, noting that while prospective bidders are arguably not parties in interest, they are welcomed to appear as least as friends of the court to offer valuable insight and perspective to the court in fulfilling its duty to consider the reasonableness of the terms and conditions of any proposed sale of estate assets. See In re Jon J. Peterson, Inc., 411 B.R. 131, 135 (Bankr. W.D.N.Y. 2009).

15. First, Akara objects to the requirement that it, if it is a Potential Bidder (as such term is defined in the Motion), it is required to submit a form of Purchase and Sale Agreement

(the "**PSA**") provided by the Debtor (see Mtn., § 1.4.5) to be considered a Qualified Bid (as such term is defined in the Motion). The Debtor proposes that the acceptable form of PSA must contain the same or better terms, "(as determined by the Debtor)" than the PSA in red-line format showing changes from the PSA submitted by the Purchaser.

16. As described above, the Debtor and Akara have already fully negotiated the Akara PSA. Given the substantial resources it has already expended in negotiating with the Debtor and its advisors, Akara requests that it be granted leave to use the form of the Akara PSA, if it chooses, that was previously negotiated with the Debtor, and that such form be deemed a proper Qualified Bid, should Akara determine to participate in any court-approved bidding process.[1]

17. Second, Akara objects to entry of an order allowing a $100,000 termination fee to the Purchaser as a stalking-horse protection ("**Break-Up Fee**") and an administrative expense of Debtor's Estate, if it is not the prevailing bidder at sale. "[A]bsent compelling circumstances which clearly indicate that payment of the fee would be in the best interests of the estate, breakup fees should not be awarded in bankruptcy auction sales." In re S.N.A. Nut Co., 186 B.R. 98, 105 (Bankr. N.D. Ill. 1995).

18. The Debtor engaged in extensive marketing efforts since November 2016, and ultimately none of the bids made at its February 2017 auction met the reserve price and, as such, marketing efforts were not successful (Mtn., § 1.3.) It was only after the Debtor secured the Akara LOI, and the public announcement was made in the Debtor's Reply and in the Crain's article, did it secure the Purchaser's PSA. The Debtor's disclosure of the Akara LOI directly

[1] For avoidance of doubt, Akara reserves its rights with respect to the submission of a Qualified Bid. Nothing herein shall obligate Akara to participate in the sale process. However, to the extent that Akara determines to participate in the sale process, it files this Limited Objection to assure that sale process is fair and open to all potential bidders.

perpetuated the Purchaser's PSA and stalking horse bid. If any party is entitled to the Break-Up Fee, it is Akara, as the Akara LOI provided a "substantial contribution" to the Debtor's estate by enticing the PSA and stalking horse bid.[2]

19. Purchaser's PSA does not provide sufficient additional value to the Estate to warrant a $100,000 administrative expense break-up fee in light of the Akara LOI terms, which exceeds the Purchaser's price by only $500,000, and set forth the same amount of earnest money that was proposed in Akara's LOI. The due diligence costs incidental to any PSA was greatly borne by Akara. Purchaser, therefore, has not provided sufficient value to the Debtor's estate to warrant an award of any administrative expense termination fee.

20. "The proper standard for evaluating a breakup fee should be whether the interests of all concerned parties are best served by such a fee and the test is whether the payment of a breakup fee is in the best interests of the estate." 186 B.R. 98 at 104. When a debtor or trustee conducts a sale under § 363(b), it has an obligation to maximize revenues for the estate. Id. (citation omitted). "Therefore, bankruptcy courts should carefully scrutinize breakup fees to be sure that, following the underlying policy guiding § 363, revenues will be maximized." Id. Further, the Court, in denying the petition for costs incurred in unsuccessful bidding did not give deference to the debtor's business decision because the debtor is no longer being reorganized and instead, was a liquidating Chapter 11, and noted the unsecured creditors' committee opposition to payment of the breakup fee, which was warranted more deference to the unsecureds' viewpoint. Id. at 105.

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[2] Akara reserves its right to file a motion for an administrative claim pursuant to section 503(b)(3)(D) of the Bankruptcy Code for reimbursement of its fees and expenses for the "substantial contribution" it has made to the Debtor's bankruptcy estate.

21. Similarly, there is no organization in play here, "[t]he Debtor filed this bankruptcy proceeding to obtain relief from creditors and to thereby facilitate the sale of the Pittsfield property, along with the portions owned by its affiliates, and to generate funds to pay its creditors." (Mtn., ¶ 2.) Because there are no other compelling circumstances that would warrant the payment of any breakup fee to the detriment of the estate's creditors, entry of an order allowing a $100,000 termination fee to the Purchaser as an administrative expense should not be granted.

WHEREFORE, Akara respectfully requests that the Court, (a) grant Akara leave to use the form of Akara PSA previously negotiated with the Debtor, and that such form be deemed a proper Qualified Bid, should it participate in any court-approved bidding process; (b) deny Debtor's request for the Break-Up fee; and (c) granting such further relief as is appropriate in the circumstances.

Respectfully Submitted,

AKARA PARTNERS, LLC

Dated: May 30, 2017

By: /s/ Jean Soh
One of Its Attorneys

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